No. 87-191

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ANN FLAMM and ARNOLD FLAMM,
on behalf of a class,

Petitioners,

v.

RUDOLPH EBERSTADT, JR.,
and MICRODOT, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Whether the Seventh Circuit properly affirmed the district court's judgment in ruling that, since investors were aware of Microdot's search for a "white knight," Microdot's disclosures neither omitted nor misrepresented any material fact?

2. Whether the Seventh Circuit described the proper standard for measuring damages in this case?

STATEMENT REQUIRED BY RULE 28.1

Respondent, Microdot, Inc., is currently a corporation which has no parent company, nor any affiliates or subsidiaries which are not wholly-owned by Microdot.

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Respondents Rudolph Eberstadt, Jr. ("Eberstadt") and Microdot, Inc. ("Microdot") respectfully request that the Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit ("Petition") filed by Ann Flamm and Arnold Flamm (collectively "Flamm") be denied. Contrary to contentions contained in the Petition, the decision of the Court of Appeals for the Seventh

Circuit in this case does not conflict with the decision of the Sixth Circuit in *Levinson v. Basic, Inc.* 786 F. 2d 741 (6th Cir. 1986), *cert. granted,* ___ U.S. ___, 107 S.Ct. 1284 (1987).[1] To the contrary, the decision in this case does not rest upon the legal duty to disclose merger negotiations, but rather, upon unique factual issues. Both the jury and the Court of Appeals concluded that the disclosures made by Microdot to the investing public fully and truthfully disclosed all material information. Furthermore the Seventh Circuit applied well-established legal theories in describing the burden which Petitioners must sustain to prove their damages. The opinion neither modified nor departed from settled principles of law. In light of the foregoing, the Petition fails to present this Court with any issue which is appropriate for review.

STATEMENT OF THE CASE

Petitioners' Statement Of The Case is replete with inaccuracies and omissions. However, rather than burdening this Court with a point-by-point rejoinder, Respondents submit that the Seventh Circuit's recitation of the facts is fully accurate and complete. Morever, only three proven facts need be highlighted in order

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[1] The Petitioners' claim that the Seventh Circuit adopted a *per se* rule that merger talks are not material until agreement has been reached upon price and structure. (Petition at p. 7). This *per se* rule allegedly comports with the Third Circuit's decision in *Greenfield v. Hueblein, Inc.*, 742 F. 2d 751 (3d Cir. 1984), *cert. denied*, 469 U.S. 1215, 105 S.Ct. 1189 (1985), and conflicts with the Sixth Circuit's opinion in *Levinson v. Basic, Inc.*, 786 F. 2d 741 (6th Cir. 1986), *cert. granted,* ___ U.S. ___, 107 S.Ct. 1284 (1987). Yet, the Petition fails to acknowledge the Seventh Circuit's language which specifically declines to choose between *Greenfield* and *Levinson*: "We therefore affirm the judgment without choosing between *Greenfield* and *Levinson.*" (814 F. 2d at 1179). In fact, the Seventh Circuit's opinion in this case does not conflict with *Levinson*. Rather, it rests upon unique facts which demonstrate that full disclosure did occur.

to demonstrate (as demonstrated to the satisfaction of the jury and the Court of Appeals), that Flamm in particular and Microdot investors in general knew and understood that Microdot would seek a white knight bid in response to a hostile takeover attempt by General Cable Corporation.[2] These facts are of conclusive significance since the gravamen of Flamm's complaint was that Microdot investors were defrauded by a series of press releases and advertisements which either: (a) failed to disclose that Microdot was soliciting white knight bids; or (b) misled Microdot stockholders into believing that Microdot would never accept a white knight bid. As discerned by both the jury (after a trial on the merits) and the Seventh Circuit, neither allegation has merit since Flamm in particular and the market in general knew and understood that a white knight bid could be solicited or received by Microdot. Microdot stockholders were neither misled nor deceived by the Defendants.

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[2] In addition to the three facts highlighted herein, Respondents also must correct a misimpression created by the Petition. Flamm asserts that the jury instructions delivered in this case were found to be reversible error (Petition at p. 3). In fact, while the majority opinion indicated that the jury instructions were in some respects erroneous, it declined to decide whether those errors were harmless (814 F. 2d at 1174). The concurring opinion, however, did conclude that any errors contained in the instructions were harmless (814 F. 2d at 1181). In the event that the Petition is granted, disposition of this case will require an examination of not only the legal and factual questions raised in the Petition and Response, but also the jury instructions delivered by the district court. The jury found for the Respondents on all counts of the Complaint. Therefore, the judgment of the district court must be affirmed unless this Court were to find that the jury instructions constituted reversible error.

A. Microdot's December 5, 1975 Disclosure Put Flamm On Notice That A White Knight Bid Might Be Solicited.

On December 5, 1975, Microdot mailed to its stockholders the first of several communications regarding General Cable's proposed hostile takeover of Microdot (Tr. 442). This communication enclosed both a letter from Eberstadt to the stockholders and the text of a December 5, 1975 press release issued by Microdot (See p. 1a where Plaintiffs' Exhibit 6, the December 5, 1975 letter and attached press release, is reproduced). In part, the press release advised Microdot stockholders that:

> After careful consideration of the proposed offer and consulting with Goldman, Sachs & Co., our investment bankers, we have concluded that the General Cable offer is totally inadequate. *We will employ all resources at our disposal to defeat the offer.*"

(Pl. Ex. 6, emphasis added).

At trial, Flamm admitted that: (a) he saw the letter and press release (Tr. 103), and (b) the information contained in the letter and press release alerted him to the fact that one resource available to Microdot to defeat the General Cable offer was the solicitation of white knight bids:

Q. All right. Now, also in Plaintiffs' Exhibit 6, do you see the last sentence in the news release, the second paragraph there, where it says, "We will employ all resources at our disposal to defeat the offer"?

A. I do see that, yes.

Q. When you read that in '75, what did that mean to you?

A. Well, I don't remember my exact reaction, but I assume it meant just, you know, what it said, that they were going to employ all resources to defeat the offer.

Q. And when you read that, you understood that one of

those means would be to try and find a higher offer, didn't you?

A. Well, it was certainly, one of the possible means that was available, yes.

* * *

Q. You also knew that one of the resources at their disposal to defeat that offer was to find a higher offer, a white knight, right?

A. Yes.

(Tr. 146-147).

Thus, Microdot's very first disclosure to stockholders alerted Flamm to the possibility of Microdot's soliciting a white knight bid. His claim that Microdot failed to disclose the search for a white knight is simply unsupportable on this record.

B. Flamm's Subsequent Conduct Confirmed His Awareness Of Microdot's Solicitation Of White Knight Bids.

While generally aware that a white knight bid could be solicited, Flamm claimed that certain Microdot advertisements published on December 15 and 16, 1975, convinced him, and others like him, that Microdot would never accept a white knight bid (Petition at p. 6). Flamm read the statements contained in those advertisements as a "sort of ideological ground for opposing tender offers." (Tr. 113). Although Flamm claims that he "understood these communications to mean that Microdot was committed to independence to the exclusion of any merger" (Petition at p. 6), his subsequent conduct belies his claim.

Flamm testified at trial that the December 16, 1975 advertisement reinforced his decision to sell his Microdot shares (Tr. 118). Despite the fact that on December 16, 1975, Flamm was convinced that he would sell his Microdot shares, he delayed the sale of those shares until December 29, 1975, a period of nearly two weeks! Flamm admitted that he delayed the sale of his Microdot shares for this two-

week period in order to see whether a white knight bid developed:

> Q. Isn't it in fact true, Mr. Flamm, you waited another two weeks to sell because you were waiting to see if there was a higher offer?
>
> A. I don't recall that being the case. It certainly – you know, I don't recall why I waited, but it is certainly possible that that was one of the factors that caused me to hold off, to see if something else came through, yes, it is quite possible.

(Tr. 191).

If Microdot's disclosures had really convinced Flamm that Microdot would never accept a white knight bid, why did Flamm delay the sale of his Microdot shares for a period of two weeks in order to see whether a white knight bid developed? The answer is simple. Microdot's disclosures never misled Flamm in any respect. Rather, Flamm independently made a bad investment decision. His bad investment decision, however, was not caused by fraud or deception on the part of Microdot as the jury properly concluded.

C. The Price Movement Of Microdot Shares Demonstrated That Market Investors As A Whole Recognized That A White Knight Bid Might Be Forthcoming.

In addition to evidence regarding Flamm's personal knowledge of a possible white knight bid, Respondents' evidence at trial demonstrated that market investors as a whole knew and understood that a white knight bid could be made. Respondents presented the prices for trades in Microdot stock between December 1, 1975 and January 16, 1976. On repeated occasions during that period, Microdot stock traded in excess of the maximum price proposed by General Cable (Defendants' Ex. 40). Indeed, Flamm himself admitted that investors would only purchase Microdot stock at a price in excess of General Cable's proposed maximum price if they believed that a higher-priced, white

knight bid was forthcoming:

Q. Now, the Microdot stock went up higher than that, didn't it?

A. I believe at one point it went up to – was it $ 18, or something of that sort, for a day or so.

Q. Wasn't it in fact over 18, 18 and something?

A. It could be I don't remember.

Q. Now, at least the market believed that there would be a higher offer, didn't they?

A. Well, at least one guy who was buying the stock believed it, yes.

Q. Well, isn't that true, in a tender offer situation the stock price doesn't go above the offer price unless somebody thinks there is going to be a higher offer?

A. I think that is probably right, yes.

Q. And you understood that at the time, didn't you?

A. Understood what, that somebody was expecting a higher offer?

Q. Yes.

A. I think I probably did, yes.

(Tr. 152-153).

Thus, the fact that investors repeatedly paid more for Microdot stock than the maximum price proposed by General Cable reflected a general acknowledgment by market investors of the potential for a white knight bid. Respondents' statements simply did not mislead the market. Rather, the market acted at all times with full knowledge of the potential for a white knight bid.

REASONS FOR DENYING THE WRIT

I

THE SEVENTH CIRCUIT'S DECISION CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT UNDER WELL-SETTLED LAW AND THE FACTS OF THIS CASE, AND THE DECISION IS NOT IN CONFLICT WITH ANY OTHER COURT OF APPEALS DECISION

A. Regardless Of The Manner In Which this Court Decides *Basic, Inc. v. Levinson,* The Decision Of The Court Of Appeals In This Case Is Correct

The principle ground asserted by Flamm in support of the Petition is that this Court's decision in *Basic, Inc. v. Levinson,* (No. 86-279), will be dispositive of the appeal in this case. Microdot and Eberstadt respectfully submit, however, that regardless of the manner in which this Court decides *Levinson,* the Seventh Circuit's decision in this case is entirely correct and raises no issues worthy of this Court's attention.

Levinson presents this Court with the question of when a corporation must disclose information which is otherwise unknown to the investing public. By contrast, the decision in this case did not rest upon that issue. Rather, the decision rested squarely on two undisputed facts: (a) Microdot's disclosures were sufficient to alert investors to the possibility of a white knight bid; and (b) as a result of those disclosures, as well as general market information, investors knew that a white knight bid could occur.[3]

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[3] It is well settled that a corporation need not disclose information which is already known to the investing public. *Seibert v. Sperry Rand Corporation,* 586 F. 2d 949, 952 (2d Cir. 1978); *Securities and Exchange Commission v. Coffey,* 493 F. 2d 1304, 1313 (6th Cir. 1974), *cert. denied,* 420 U.S. 908, 95 S.Ct. 826

(Footnote continued on the following page)

In light of those conclusive facts established at trial, the question posed in *Levinson* (i.e. a duty to disclose information which is unknown to the investing public), was entirely irrelevant to the resolution of this case. In this case, the investing public (including Flamm) knew that there could be a white knight bid for Microdot. Since the information at issue was already possessed by the investing public, no further disclosure duty can or should be imposed upon Respondents in this case.

B. A Public Corporation Which Has Given Good Investment Counsel To Its Stockholders Should Not Be Held Liable For Damages Under The Securities Exchange Act.

Throughout the course of this lawsuit's eleven-year history, Respondents have maintained that it presents a curious paradox. Petitioners are complaining because they failed to follow Respondents' good investment advice. As the Seventh Circuit correctly observed, Microdot gave its stockholders only one piece of investment advice:

> The only concrete advice Microdot gave its investors was not to sell, because $ 17 was too low. As things turned out, that was wise counsel. Flamm is hardly in a position to contend that because he rejected this advice he has been deceived.

(814 F. 2d at 1179).

Respondents submit that, notwithstanding the legal issues which Flamm asks this Court to address, resolution of this case turns on one fundamental and conclusively proven fact -- Respondents neither misled nor otherwise

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3 *(Continued)*

(1975); and *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1492-1493 (D. Del. 1984). The Seventh Circuit's decision in this case is merely an application of that principle.

deceived Microdot investors.[4] The following passage from the Court of Appeals' concurring opinion underscores the conclusive nature of the fact that Respondents' public statements were honest:

> I would merely hold that on the specific facts of this case there has been no nondisclosure or misrepresentation from which a reasonable jury could conclude that the securities laws had been violated. The evidence, as the majority has reviewed it, supports this conclusion, and that is all we are required to decide.

(814 F. 2d at 1182).

Thus, the legal questions presented in the Petition, though perhaps of academic interest, are simply not dispositive of this case. Resolution of this case rests upon unchallenged factual findings which led both the jury and Seventh Circuit to conclude that Respondents did not defraud Microdot investors. *Lucas v. Florida Power & Light Co.*, 765 F. 2d 1039 (11th Cir. 1985). This case simply does not merit Supreme Court review.

II

THE COURT OF APPEALS DESCRIBED THE PROPER STANDARD FOR MEASURING PLAINTIFFS' DAMAGES

Since the Court of Appeals properly affirmed the district court's judgment in favor of Respondents, this Court

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[4] Petitioners' Question Number 2 asks whether a disclosure duty should be imposed upon a corporation which makes some statement other than "no corporate development." In this case, however, the Seventh Circuit examined Respondents' public statements and found that Petitioners' efforts to interpret those statements in a misleading fashion were unreasonable. Thus, the Court of Appeals specifically found that Respondents made no statements concerning "searching for higher bids" that could create a duty to disclose. It was upon this basis that the court distinguished *Levinson*. (814 F.2d at 1179).

need not reach the question raised by Petitioners regarding the measure of damages. Assuming, *arguendo*, that the issue is reached, it is not worthy of this Court's consideration. The Seventh Circuit's opinion referenced in passing the burden which a plaintiff must sustain in order to establish damages in a case of this type. The Seventh Circuit observed that:

> The usual measure of damages in a case under Rule 10b-5 is the difference between what the stock fetched and what it would have been worth had all of the information been disclosed.

(814 F. 2d at 1179).

This general statement comports in all respects with existing case authority under the Federal securities laws. In fact, in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 92 S.Ct. 1456 (1972), this Court described the measure of damages under the Securities Exchange Act in almost identical terms:

> In our view, the correct measure of damages under § 28 of the Act, 15 U.S.C. §78bb(a), is the difference between the fair value of all that the mixed-blood seller received and the fair value of what he would have received had there been no fraudulent conduct . . . .

406 U.S. at 155.

After describing the generalized standard, the Seventh Circuit noted that Petitioners may have failed to meet their evidentiary burden at trial. Specifically, the court noted that Petitioners had failed to produce evidence of the fair value of what they would have received for their Microdot shares had there been no allegedly fraudulent conduct.[5] The court did not decide, however, that Peti-

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[5] Petitioners suggest that they are entitled to demonstrate that their stock would have been worth $ 21.00 per share. While this

(Footnote continued on the following page)

tioners were barred from recovering damages. Rather, it merely identified the quantum of proof which Petitioners must adduce in order to demonstrate the measure of damages to which they claim entitlement.

Since no specific conclusion was drawn by the Court of Appeals, Petitioners will be entitled to present proof of the full measure of damages which they claim in the event that: (a) this case is remanded for retrial; and (b) Petitioners prevail upon the merits. Thus, Flamm's claim that the Court of Appeals created an improper standard for measuring damages misinterprets the court's discussion of this issue. The court merely highlighted the fact that, without proof of actual damages caused by the fraud, monetary damages may not be recovered.

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5 *(Continued)*

may be correct, the Seventh Circuit's opinion merely highlighted additional factors which the jury could consider in making this factual determination. *See In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 744-745 (S.D.N.Y. 1985), *aff'd*, 798 F. 2d 35 (2d Cir. 1986); *Beissinger v. Rockwood Computer Corporation*, 529 F. Supp. 770, 788-790 (E.D. Pa. 1981); and *J.G. Rubinstein v. IU International Corporation*, 506 F. Supp. 311, 317-318 (E.D. Pa. 1980).

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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APPENDIX

Wall Street Journal
Mon. Dec. 8

Attention Microdot Stockholders

Dear Fellow Shareowner:

I have some good news for you. Microdot's Board of Directors today declared a quarterly dividend of $.25 a share. The dividend is payable March 1, 1976, to shareholders of record February 2, 1976. This represents a 67% increase over the $.15 a share quarterly dividend paid during 1975 and is the fourth dividend increase in four years. This new rate represents a 150% increase over dividends in 1972.

The increase was in accordance with the policy of Microdot's Board, established in mid–1973 to increase dividends whenever earnings prospects warrant such action.

As you may remember, we have in the past declared dividend increases at January Board meetings but we felt you should know about this increase now in view of what it indicates for our earnings prospects in 1976.

Some of you may have seen an announcement in the press of a possible tender offer by a company called General Cable. Your Board of Directors has voted unanimously to recommend that you reject this offer if it ever gets off the ground. The news release makes our position clear. I want to write you a very careful and detailed analysis of why this General Cable proposal is not in your interests. But the far more important thing for you to bear in mind is that *right now no action of any kind is called for on your part.* The offer is of an uncertain nature as of right

now. I will keep you further closely advised and try to be as helpful with advice as I can.

Sincerely yours,
/s/ R. EBERSTADT, JR.

R. Eberstadt, Jr.
President and Chief
Executive Officer

December 5, 1975

STOP AND THINK

If your broker urges you to sell your shares, ask yourself if he is more interested in the commission he will make on your stock (and on your possible re-investment of funds) than he is in your welfare.

NEWS RELEASE

GREENWICH, CONNECTICUT, Dec. 5, 1975 – Microdot Inc. announced today that its Board of Directors voted unanimously to recommend rejection of General Cable's proposed tender offer for Microdot. The company said no officer or director or Microdot will tender any shares in response to the offer.

Rudolph Eberstadt, Jr., President and Chief Executive Officer of Microdot said, "We believe that the action of General Cable in announcing its offer without seeking to discuss our stockholders' interests with management is cynical and unethical and raises serious questions about their true motive. After careful consideration of the proposed offer and consulting with Goldman, Sachs & Co., our investment bankers, we have concluded that the General Cable offer is totally inadequate. We will employ all resources at our disposal to defeat the offer."

Mr. Eberstadt emphasized Microdot's intention to ini-

tiate legal proceedings to determine the propriety of the actions of General Cable and its management and directors. He also referred to antitrust questions raised by the offer, including the affiliation between General Cable and a major British cable producer which is presently subject to an order of a Federal court in New York.

Mr. Eberstadt said that General Cable's president in a meeting with Microdot's management after the announcement of the tender had admitted he knew little about Microdot's business but had held out the promise that Microdot's management would be one of the " more important assets they would want to obtain" if they were successful in their tender.

"We believe this makes clear," Mr. Eberstadt said, "that our recommendation to our stockholders is not based on any desire to save our jobs."

Finally, Mr. Eberstadt noted that the General Cable offer cannot proceed prior to a hearing before the Ohio Division of Securities which has been scheduled for December 12, 1975. Details necessary to permit Microdot stockholders to understand and evaluate the offer will not be available until after the hearing.

In the event that trading is resumed and the offer is eventually made, Mr. Eberstadt said stockholders would have plenty of time to consider whether the offer was really in their interests.